RECENT AMERICAN DECISIONS.

Supreme Court of Rhode Island.

JAMES ORR *v.* OSCAR A. TANNER.

An attorney who refuses to pay over money belonging to his client will be ordered to do so on motion of the client.

A contract between attorney and client that if anything is recovered the attorney is to receive one-half the amount obtained, after deducting expenses, is void for champerty.

MOTION for an order of court.

James Tillinghast, for the petitioner.

Oscar A. Tanner, pro se ipso.

The opinion of the court was delivered by

POTTER, J.—The complainant asks this court for an order on one of its attorneys requiring him to pay over certain money which he received in a suit brought for the complainant, and also for the money which the complainant paid said attorney for expenses, and for what the complainant has lost by the discontinuance of his case by the said attorney.

Some of the facts alleged by the complainant are denied by the respondent, but we think the undisputed facts in the case are sufficient to justify and require us to make an order against the respondent.

The complainant alleges that he placed in the respondent's hands for collection a claim for $593.18 against Thomas Pray, on an agreement that if anything was recovered the attorney was to take for his compensation one-half the amount obtained after deducting expenses. The complainant paid down to the respondent certain sums for expenses. A suit was brought, and the defendant's funds in a certain bank attached to the amount of $765.59. The defendant afterwards became bankrupt, but not until more than four months had elapsed after the attachment. The respondent afterwards discontinued the suit on receiving from Mr. Lapham, the attorney for the bankrupt defendant, the sum of $100. And of the receipt of this sum he gave the complainant no information.

The respondent's defence is that as it was doubtful whether he could recover, he had a right to compromise or discontinue the suit, and he agreed to do so on the defendant's attorney agreeing to pay him $100, which he says was for his attorney's fees and not as a part of the claim sued for.

The relation of attorney and client is a relation implying the utmost confidence and trust on the part of the client reposed in the attorney, and a corresponding obligation on the part of the attorney towards the client, which he should endeavor to perform faithfully, not merely from a sense of duty to his client, but from a sense of honor, as a member of an honorable profession whose character and estimation depend upon the individual character and reputation of its members. This relation implies that he is to look to his client alone for his compensation. To receive any compensation from the opposite party or his attorney, without the consent of his own client, is a breach of the trust reposed in him by his employer.

We regret that we are obliged to say this. But if, as the respondent contends, he did as he did because other attorneys of this court have indulged in such practices, while that fact may lessen the blame in this particular case, it becomes all the more necessary that the court should express its opinion that the practice is deserving of the severest censure, and utterly inconsistent with that character of honesty and honor which should belong to all the members of the profession.

And we feel bound to notice another fact which appears in the proceedings. According to the allegation of the complainant, and which is not plainly denied, the original agreement for compensation was champerty, and constitutes an indictable offence; and the practice, if it has become a practice, of making such agreements should be discouraged and condemned; and if in the course of legal proceedings in any case any such agreement should come to the notice of the court, we shall feel obliged to refer it to the attorney-general for his official action.

The charge of $100 was out of all proportion to the services rendered; but as he had no right whatever to take pay for his services from the opposite party, we must treat it as received for the use of the client, the complainant.

As there is no dispute about the receipt of this sum of $100, we shall make an order for the payment of it to the complainant and without any deduction. We think that is as far as we can go on the present application. Order accordingly.

1. Upon the first point arising in this case, there is no question as to the control of courts over their attorneys to enforce by summary process the prompt payment to clients of money collected for them. Such attorneys are not only debtors to their clients, liable to an action at law for money had and received,

like any other agents, but are also officers of the court, subject to their orders, bound to obey their decrees, and punishable for not doing so. The court may therefore, *upon motion*, direct the payment of a client's money, and in case of neglect or refusal imprison the attorney, or even strike his name from the rolls. See *In re Bleakley*, 5 Paige 311 (1835). And see *Dann* v. *Vanner-son*, 7 How. (Miss.) 579 (1843).

And the imprisonment in such cases is not an imprisonment *for debt*, but for a contempt of court. Bankruptcy proceedings are no bar, and although utterly unable to pay the amount, the attorney has no *right* to a discharge upon habeas corpus. *Smith* v. *McLendon*, S. C. Georgia, (Aug. T. 1877), 6 Reporter 139.

On such an application the attorney can be compelled to pay only what he has in fact collected for his client, and not *in that mode of proceeding*, any amount he failed or neglected to collect when he might have done so. *Croft* v. *Hicks*, 26 Texas 383 (1862).

But a motion for such purpose is entertained only on motion of *the client*. It is a privilege given to clients for their protection against exactions and over-reachings, which the attorney, by reason of the confidence placed in him by his client, might resort to. But this extraordinary remedy is not extended to outside parties, or assignees of clients. *Hess* v. *Joseph*, 7 Robertson (N. Y.) 609 (1867).

Therefore when an attorney, in settling an account with an executor who had employed him, retained in his hands a legacy duty to be paid to the stamp office, the latter could not apply by this summary process to have the attorney ordered to pay it over. *In re Fenton*, 3 Ad. & E. 404 (1835).

2. *As to the question of champerty* there is no little difference of opinion. The first view is that a contract is void where an attorney agrees to carry on the suit and pay or advance the expenses of litigation, or to indemnify the client against the same, for some share of the proceeds, land or money. The English decisions are so uniform on this subject it is unnecessary to cite them here. As proof of the steady adherence to the old rule, the learned reader is referred to the recent case of *Hilton* v. *Woods*, Law Rep. 4 Eq. 432 (1867).

And some American courts have adopted the English rule in all its vigor. *Thurston* v. *Percival*, 1 Pick. 415 (1821), is perhaps the leading case in America on this point.

Rhode Island, in an important case, in 1866, adopted the same view. *Martin* v. *Clarke*, 8 R. I. 389. And see *Coquillard* v. *Beares*, 21 Ind. 479 (1869); *Lafferty* v. *Jelley*, 22 Id. 471 (1864); *Byrd* v. *Odem*, 9 Ala. 755 (1846); *Holloway* v. *Lowe*, 7 Porter 488 (1838); *Elliott* v. *McClelland*, 17 Ala. 206 (1850); *Key* v. *Vattier*, 1 Ohio 132 (1823); *Weakley* v. *Hall*, 13 Id. 167 (1844); *Brown* v. *Beauchamp*, 5 T. B. Mon. 413 (1827); *Thompson* v. *Warren*, 8 B. Mon. 488 (1848); *Boardman* v. *Brown*, 25 Iowa 487 (1868), reviewing the cases; *Satterlee* v. *Frazer*, 2 Sand. 141 (1848); *Berrien* v. *McLane*, 1 Hoff. Ch. 421 (1840); *Merritt* v. *Lambert*, 10 Paige 352 (1843), affirmed in 2 Denio 607; *Stearns* v. *Felker*, 28 Wis. 594 (1871).

The common-law rule does not grow out of the relation of solicitor and client, but applies equally to others; and in England an agreement by one not an attorney to procure information and furnish evidence to enable another to substantiate his claim, upon condition of receiving a portion of the proceeds, is invalid. *Stanley* v. *Jones*, 7 Bing. 369; 5 M. & P. 193 (1831). And see *Sprye* v. *Porter*, 7 E. & B. 58 (1856); *Reynell* v. *Sprye*, 8 Hare 222 (1849); s. c. 1 D., M. & G. 660.

On the other hand in some states the old common-law rule is altogether repudi-

ated, and it is held that no such contract is now invalid, unless it contravenes some existing statute of the state. Such was the carefully considered case of *Sedgwick* v. *Stanton*, 14 N. Y. 289 (1856); *Durgin* v. *Ireland*, Id. 322.

And such, perhaps owing to their code allowing attorneys to make any agreement with their clients, is probably the established law in New York: *Voorhees* v. *Dorr*, 51 Barb. 580 (1868); *Richardson* v. *Rowland*, 40 Conn. 572 (1873), a decision on a contract made in New York, and, therefore, governed by the laws thereof.

The same rule exists in California and perhaps other states. *Matthewson* v. *Fitch*, 22 Cal. 86 (1863); *Hoffman* v. *Vallejo*, 45 Id. 564 (1873.) And see *Lytle* v. *The State*, 17 Ark. 609 (1857).

The second class of cases make it unimportant whether the attorney or the client are to pay the expenses. Most notably in this class perhaps is the case of *Lathrop* v. *Amherst Bank*, 9 Met. 489 (1845), in which the point was distinctly made, and overruled. DEWEY, J., said upon this point, "It was suggested in the argument that the facts here shown do not bring the case strictly within the definition of champerty, as the plaintiff was not to conduct the suit wholly at his own expense, but was, in the event of a failure to sustain the action, to be remunerated for his actual expenses. It is true that some of the elementary books, in defining champerty, say that 'the champertor is to carry on the suit at his own expense,' as 4 Bl. Com. 135; Chit. Cont. (5th Am. ed.) 675. Other books of equal authority omit this part of the definition of champerty; as in 1 Hawk. c. 84, § 1; Co. Litt. 368 *b*. Maintenance and champerty, if we are to judge from the manner in which they are usually introduced in connexion with this subject, are deemed illegal, not from the consideration that all the expenses of the litigation are to be borne by a stranger, but in reference to the evils resulting from officious intermeddling, and upholding another's litigation by personal services as well as money; more dangerous formerly than now, as more powerful combinations were resorted to with a view of controlling, if not overawing, the judicial tribunals." The same view was entirely approved in the well considered cases of *Scobey* v. *Ross*, 13 Ind. 117 (1859), and *Backus* v. *Byrns*, 4 Mich. 535 (1857).

And the Court of Appeals in Kentucky had declared twenty years before that Hawkins's definition was correct, and that it was not essential that the attorney carry on the suit at his own expense. *Rust* v. *Larue*, 4 Litt. 419 (1823). And see *Davis* v. *Sharron*, 15 B. Mon. 64 (1854), decided however upon a statute of Kentucky.

On the other hand some very respectable courts hold such agreement an essential feature to constitute champerty, and declare that a mere agreement to divide the proceeds, with no undertaking or obligation to pay any part of the expenses is not invalid. *Allard* v. *Lamirande*, 29 Wis. 502 (1872), is a carefully considered case on that precise point. And so are *Bayard* v. *McLane*, 3 Harrington 139 (1839); *Benedict* v. *Stuart*, 23 Barb. 420 (1856); *Moses* v. *Bagley*, 55 Geo. 283 (1875).

Such is the rule in Missouri. *Duke* v. *Harper*, 5 Reporter 624 (Oct. T. 1877) 66 Mo.

As to a per centage on the amount recovered. The courts of the United States allow attorneys to stipulate for a reasonable per centage of the amount recovered, as a compensation for services. *Wylie* v. *Coxe*, 15 How. 415 (1853), five per cent.; *Wright* v. *Jebbitts*, 91 U. S. Rep. 252 (1875) ten per cent.

But in many courts a contract to pay a solicitor any per centum of the amount recovered is open to objection. *Strange* v. *Brennan*, 16 Sim. 346 (1846); affirmed in 2 C. P. Cooper 1; *Thurston* v. *Percival*, 1 Pick. 415 (1821); *Lathrop*

v. *Amherst Bank*, 9 Met. 491; *Elliott* v. *McClelland*, 17 Ala. 206 (1850); *Pince* v. *Beattie*, 32 Law J. Ch. (N. S.) 734 (1863).

As to contingent fees. The English courts are decidedly opposed to the validity of a contract between attorney and client for a contingent fee dependant upon success in a suit, especially when the attorney is to advance all sums necessary to carry on the litigation. *Earle* v. *Hopwood*, 10 C. B. N. S. 566 (1861), in which the client stipulated to pay his attorney "over and above all legal costs and charges incurred, a sum of money according to the interest and benefit to him from the possession of the estate in litigation, and sufficient to compensate and reward the attorney for making the advances, and incurring the liabilities, and devoting his utmost skill, care and labor in instituting and carrying on and defending the proceedings," the client being without means of paying in case of failure. Under this agreement the plaintiff brought suit for 30,000*l.* Upon demurrer the court gave judgment for the defendant, saying that the bargain fell precisely within the rule as to maintenance. The only difference being that in the former the party would have the security of the property, whereas here he has only the personal security of the defendant. But if the defendant be a solvent man, he gets a share of the property by another mode, viz., by suing him and obtaining judgment.

On the other hand, the Supreme Court of the United States, in a recent case, have distinctly recognised the validity of such contracts. *Stanton* v. *Embrey*. 93 U. S. Rep. 548 (1876); *Ex parte Plitt*, 2 Wall. Jr. 453 (1853); *Stanton* v. *Haskin*, 1 MacArthur 558 (1874). And so have some of the state courts. *Allard* v. *Lamirande*, 29 Wisconsin 502; (1872); *Newkirk* v. *Cone*, 18 Ill. 449 (1857). And this is allowed by statute in New York. *Fitch* v. *Gardner*, 2 Keyes 616; *Hetchings* v. *Van Brunt*, 38 N. Y. 335; *Porter* v. *Parmly*, 39 N. Y. Superior Court 232.

In Iowa also a contract for a contingent fee is upheld, there being no agreement that the attorney pay expenses, nor that the client should not settle the case, "nor any other objectionable matters pointed out in *Boardman* v. *Brown*, 25 Iowa 489." *McDonald* v. *Chicago &c. Railroad Co.*, 29 Iowa 171 (1870).

Under this head of contingent fees may perhaps be ranked those cases which while they refuse to allow an attorney to have a direct interest in the subject-matter of a suit, do allow him to stipulate for compensation to an *amount equal* to one-half of the amount recovered; it being, they say, a client's right to regulate his attorney's fee by the value of one-half the property in contest, as well as by the value of any other property. See *Wilhite* v. *Roberts*, 4 Dana 172 (1836); *Evans* v. *Beth*, 6 Id. 479 (1838); *Ramsey* v. *Trent*, 10 B. Mon. 341 (1850). But this is certainly approaching very near the line.

EDMUND H. BENNETT.

Supreme Court Commission of Ohio.

THE ERIE RAILWAY COMPANY *v.* E. T. STRINGER.

In regard to the jurisdiction of the federal courts, a corporation is a citizen of the state by which it was created.

A foreign railroad corporation does not become an Ohio corporation or a citizen of Ohio by merely leasing, possessing and operating in that state, the property of an Ohio railroad company.